

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ROSEMARY DAVIS, o.b.o)	No. CV 13-06776-VBK
JAMIE DAVIS,)	
)	MEMORANDUM OPINION
Plaintiff,)	AND ORDER
)	
v.)	(Social Security Case)
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	
)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the Administrative Record ("AR") before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified AR.

1 Plaintiff raises the following issues:

- 2 1. Whether the Administrative Law Judge ("ALJ") properly
3 considered the opinions of Dr. Lindsay Reder, M.D. about
4 Plaintiff's disability beginning in March 2011;
- 5 2. Whether the ALJ properly considered Plaintiff's credibility;
6 and
- 7 3. Whether the ALJ properly considered the testimony of
8 Plaintiff's wife.

9 (JS at 3.)

10
11 This Memorandum Opinion will constitute the Court's findings of
12 fact and conclusions of law. After reviewing the matter, the Court
13 concludes that for the reasons set forth, the decision of the
14 Commissioner must be reversed and the matter remanded.

15
16 I

17 **THE ALJ PROPERLY CONSIDERED THE OPINIONS OF DR. LINDSAY REDER**

18 Shortly after the issuance of an unfavorable hearing Decision,
19 Plaintiff died, and his widow, Rosemary Davis, was substituted as
20 Plaintiff on his behalf. (AR 7-8.) As suggested by the parties, the
21 Court will reference Jamie Davis, the decedent, as Plaintiff.

22 In his Decision (AR 14-25), the ALJ determined that at Step Two
23 of the sequential evaluation process, Plaintiff has the following
24 severe impairments: cancer of the supraglottis, status post-
25 chemotherapy and radiation; hypertension; hypothyroidism; chronic
26 Hepatitis B and C infection; obesity; anxiety disorder NOS; borderline
27 intellectual functioning; and a personality disorder with anti-social
28 traits. (AR 16.)

1 Plaintiff has a long treatment history, which the ALJ summarized
2 (AR 20-22), and which Plaintiff's counsel has exhaustively discussed
3 in her portion of the JS.

4 After reviewing the evidence, and conducting a hearing, at which
5 testimony was taken from Plaintiff (who was represented by counsel),
6 his wife, and a vocational expert ("VE"), the ALJ assessed a residual
7 functional capacity ("RFC") of light work, avoidance of extreme cold
8 and heat, fumes, odors, dust, gasses, and poor ventilation, and an
9 ability to perform simple work. (AR 19.)

10 Plaintiff was first seen by Dr. Reder at LAC-USC on July 17,
11 2011. (AR 504.) He visited Dr. Reder again on October 4, 2011 (AR 509-
12 511); October 18, 2011 (AR 512); and November 9, 2011 (AR 515-517).
13 Dr. Reder prepared a report of this examination which contained the
14 following statement:

15 "Disability March 2011 - March 2013. Patient cannot be
16 exposed to dust, chemicals, or strenuous activity, his
17 breathing limits his ability to walk long distances."
18 (AR 517.)

19
20 It is the above statement of Dr. Reder which is the focus of
21 Plaintiff's first issue. Plaintiff asserts that the ALJ erred in his
22 assessment of Dr. Reder's opinion, in particular, the ALJ's statement
23 in the Decision that,

24 "To the extent it [Dr. Reder's opinion] is consistent
25 with the assessments of the consultative internist and State
26 Agency medical consultant, I accept the doctor assessment.
27 To the extent it can be interpreted as inconsistent I give
28 it less weight because the doctor does not quantify the

1 limitation on walking."

2 (AR 22.)

3
4 Plaintiff makes several vigorous arguments concerning this issue.
5 First, he asserts that because his condition had deteriorated after he
6 received a consultative examination ("CE") from Dr. Rodriguez on
7 September 28, 2010, and after the State Agency Physician reviewed
8 records, and further, because neither of these doctors had the benefit
9 of Dr. Reder's examinations and conclusions, that Dr. Reder
10 essentially provided an uncontradicted opinion which can only be
11 rejected, according to law, for "clear and convincing" reasons. As a
12 secondary argument, Plaintiff states that even if Dr. Reder's opinion
13 is viewed as conflicting with the opinions of these other doctors, one
14 of which is based on independent examination, still, there is an
15 absence of "specific and legitimate" reasons in the Decision to reject
16 Dr. Reder's conclusion. Finally, Plaintiff argues that the ALJ was
17 obligated to contact Dr. Reder, or do some further development of the
18 record consistent with regulations, in a situation such as this, where
19 there is, assertedly, insufficient and/or inconsistent evidence.

20 A careful review of the record, however, does not support
21 Plaintiff's interpretation. Certainly, the ALJ was aware that there
22 had been some deterioration as to aspects of Plaintiff's physical
23 condition. For example, in the Decision, the ALJ noted that, "Given
24 the longitudinal notes, it appears that the [Plaintiff's] throat pain,
25 while occurring since chemotherapy and radiation, has intensified only
26 recently." (AR 20.)

27 The Court finds it significant that at the hearing, the ALJ
28 specifically incorporated Dr. Reder's statement into questions posed

1 to the VE. In particular, with regard to Dr. Reder's assertion that
2 Plaintiff's breathing limited his ability to walk long distances, the
3 VE interpreted that as permitting an ability to walk for only two
4 hours out of an eight-hour workday. Given that limitation, the VE
5 eliminated one of the alternate jobs identified at Step Five,
6 cafeteria attendant, but noted that the other two jobs, described as
7 production assembler and cashier II, are "stationary," and can be
8 performed by Plaintiff. (AR 63.)

9 Plaintiff challenges this testimony, and the conclusions reached
10 by the ALJ, based on his interpretation that Dr. Reder's preclusion of
11 "strenuous activity" likewise would preclude Plaintiff from jobs which
12 require light exertion. Plaintiff argues that "strenuous activity
13 involves more than walking ..." (AR 17.) Plaintiff also asserts that
14 "Light exertional activity does not permit mere standing without
15 exertion." (JS at 17, citing, generally, SSR 83-10.) SSR 83-10 does
16 not, effectively, stand for the proposition proposed by Plaintiff. In
17 describing "light" work, this Regulation states, in pertinent part,
18 the following:

19 "A job is also in this category when it involves
20 sitting most of the time but with some pushing and pulling
21 of arm-hand or leg-foot controls, which require greater
22 exertion than in sedentary work ... Relatively few unskilled
23 light jobs are performed in a seated position."
24

25 Thus, the Court does not view Plaintiff's interpretation of the
26 meaning of light work in relationship to requirements of "strenuous"
27 activity as precluding Plaintiff from having an RFC which permits
28 light work, and certainly, in this litigation, the Court must only

1 determine whether the ALJ's conclusion is supported by substantial
2 evidence or if it is based on legal error. See Flaten v. Secretary of
3 Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995).

4 For the foregoing reasons, the Court does not assess error with
5 regard to the ALJ's assessment of the opinions of Dr. Reder.

6 7 II

8 THE ALJ DID NOT PROPERLY ASSESS PLAINTIFF'S CREDIBILITY

9 AS TO SUBJECTIVE SYMPTOMS

10 The ALJ depreciated Plaintiff's credibility with regard to
11 subjective symptoms (and to any limitations beyond those set forth in
12 the determined RFC), based on their being unsupported by the objective
13 evidence of record; that the medical evidence of record demonstrated
14 an improvement in his condition along with numerous rejections by
15 Plaintiff of recommended treatment; Plaintiff's work history; and his
16 status as a convicted criminal. (AR 19-21.) For the following reasons,
17 the Court agrees with Plaintiff that the ALJ improperly depreciated
18 his credibility based on evidence in the record.

19 The law is clear that an ALJ must provide "specific, clear and
20 convincing" reasons to reject excess pain and symptom testimony. See
21 Taylor v. Astrue, 659 F.3d 1228, 1234 (9th Cir. 2011).

22 The first stated reason (AR 19) is that the "objective evidence"
23 was found to be consistent with the RFC but inconsistent with
24 Plaintiff's allegations "that he is unable to perform any work
25 activity." As Plaintiff correctly points out, that is the wrong
26 standard. It is not a comparison of whether a claimant's description
27 of pain and symptoms is consistent with an inability to perform any
28 work activity, but whether work activities are limited based on such

1 symptoms. In addition, much of the "objective evidence" cited by the
2 ALJ went back to periods of time before August 6, 2010, the relevant
3 commencement period for SSI benefits. (See AR at 19.) At the time of
4 the February 2012 hearing before the ALJ, Plaintiff was awaiting
5 surgery to provide relief for his breathing. He spent most of his time
6 in bed. (AR 58.) It is correct, as the ALJ observed, that Plaintiff
7 had previously informed his physicians that he felt sufficiently well
8 to forego surgery; however, that was not the case at the time of the
9 hearing. Certainly, there is no dispute in the record that Plaintiff's
10 physicians had recommended surgery for his breathing problems. The
11 fact that Plaintiff had declined surgery does not seem to be a factor
12 that impacts on his credibility, but only his resistance to surgery.
13 That might not be surprising in view of the fact that in January 2008,
14 while Plaintiff was undergoing a biopsy of a throat lesion which later
15 proved to be cancerous, the lesion ruptured, Plaintiff lost his
16 ability to breathe, and an emergency tracheotomy was performed. (AR
17 282, 284, 294.) This might be viewed as a sufficient basis for an
18 individual to be "gun shy" of further surgery in the same area of his
19 body. The Court will further agree with Plaintiff that his previous
20 unwillingness to undergo surgery, despite substantial evidence of
21 ongoing problems and pain, does not detract from his credibility. It
22 is not as if Plaintiff did not seek treatment; indeed, there is
23 evidence in the record of numerous instances in which Plaintiff sought
24 emergency room care for throat pain (see, e.g., March 10, 2011, at AR
25 543-552, 555-556); reported pain level between 5/10 and 10/10 (AR
26 549); was diagnosed with difficulty swallowing (AR 550); was given
27 narcotic medication for severe pain (AR 546, 550); was found to have
28 "rough" speech with increased throat pain (AR 553); was determined to

1 have only part of his airway open (AR 495-496); was prescribed
2 morphine sulfate for pain, and sought refills (AR 488-493); visited
3 the emergency room to get refills of Vicodin and morphine for pain (AR
4 560-561, 570-573); reported difficulty swallowing (AR 574); and
5 finally, was seen on several occasions in 2011 by Dr. Reder, who
6 recommended surgery for these issues.

7 The ALJ also depreciated Plaintiff's credibility because of his
8 determination that Plaintiff's "overall treatment history" was
9 inconsistent with his pain allegations. (AR 21). The Court finds this
10 statement to be somewhat baffling, in view of the record of treatment
11 which Plaintiff has received. Indeed, the ALJ concluded that
12 Plaintiff's condition "appears managed with conservative care." In the
13 Court's view, the record does not substantiate that conclusion at all.
14 Furthermore, the ALJ relied upon a typed report to conclude that
15 Plaintiff's medications do not cause side effects. (AR 21, citing
16 Disability Report - Appeals, at AR 269.) This conclusion, however, was
17 provided without any acknowledgment of extensive testimony provided by
18 Plaintiff at the hearing that his medications may cause him to fall
19 asleep. (AR 47, 49. "The morphine just puts me to sleep.")

20 The next stated reason was that Plaintiff's "reported daily
21 activities are inconsistent with his alleged degree of impairment."
22 (AR 21.) In this regard, the ALJ cited statements from Plaintiff and
23 his wife for the conclusion "that he was generally able to tend to his
24 personal care needs and get along with others, including authority
25 figures ... He is also able to handle money, stress and changes in
26 routine." (*Id.*) Most of these reasons pertain to mental issues, not
27 physical ones. Further, Plaintiff's own report about his daily
28 activities provides no apparent support for the ALJ's conclusion. It

1 is worthwhile to quote what Plaintiff himself wrote in his Function
2 Report:

3 "I get up take my breathing treatment wash up eat
4 breakfast lay back down watch TV, take another breathing
5 treatment have lunch lay back down get up a 3:00 oclock
6 [sic] sit outside for one hour Take another breathing
7 treatment eat dinner watch TV till eight oclock [sic] put on
8 my CPAP - machine for sleeping."

9 (AR 219)

10
11 The report of Plaintiff's wife, similarly, describes severe
12 limitations in Plaintiff's activities of daily living ("ADL"). (AR
13 241-242.) With regard even to feeding himself, Plaintiff testified
14 that his wife puts the food in a blender, and he consumes it through
15 a straw, which he admitted that he can hold. (AR 48-49.)

16 All in all, the Court rejects any reliance upon the evidence in
17 the record as to Plaintiff's ADL as a supportable basis to depreciate
18 his credibility.

19 Finally, the ALJ's observation that Plaintiff's credibility is
20 depreciated because he has a criminal record "showing a disregard to
21 societal norms" does not merit substantial discussion, because it is
22 not supportable. (See AR 21, citing AR 457.) The only fact the ALJ
23 relied on was that Plaintiff went to prison in 2007 and was released
24 in 2011. (Id.) If the ALJ's basis for credibility assessment was to be
25 generally accepted, then any person who has a status as a convicted
26 criminal, or spent time in prison, would be viewed as not credible,
27 per se. The Court need not delve further into the issue, but will
28 observe that there is absolutely nothing in this record to indicate

1 that Plaintiff was convicted a crime of moral turpitude, which might,
2 under certain circumstances, form a basis for depreciation of
3 credibility. (See case citations at JS 34.) Based on this record,
4 however, it was not a supportable reason for depreciating Plaintiff's
5 credibility.

6 Based on the foregoing, the Court concludes that this matter must
7 be remanded for a reassessment of Plaintiff's credibility as to
8 subjective symptoms. Further, while the parties have not briefed the
9 third issue, concerning the ALJ's depreciation or rejection of the
10 information provided by Plaintiff's wife, that discussion was subsumed
11 within the second issue, and the Court does not consider that it was
12 abandoned in this litigation. On remand, evidence provided by
13 Plaintiff's wife will be considered, along with all evidence in the
14 record, in the reevaluation of Plaintiff's credibility as it may
15 impact on his RFC.

16 For the foregoing reasons, this matter will be remanded for
17 further hearing consistent with this Memorandum Opinion.

18 **IT IS SO ORDERED.**

19
20 DATED: March 24, 2014

/s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE